

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5432-08T2

VASIL KOVALCIK,

Plaintiff-Appellant,

v.

SOMERSET COUNTY
PROSECUTOR'S OFFICE,

Defendant-Respondent.

Submitted March 16, 2010 - Decided June 28, 2010

Before Judges Skillman and Fuentes.

On appeal from Superior Court of New Jersey,
Law Division, Somerset County, Docket No.
L-484-09.

Jack Venturi & Associates, attorneys for
appellant (Jennifer L. Marshall, on the brief).

Thomas C. Miller, Somerset County Counsel,
attorney for respondent (Scott D. Rodgers,
on the brief).

PER CURIAM

Plaintiff Vasil Kovalcik appeals from the order of the Law Division denying his request under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, to obtain documents from the Somerset County Prosecutor's Office (SCPO). Specifically, he sought copies of the curriculum vitae of SCPO Detectives Jorge

Ramos and Kristen Houck. He also requested a list of the courses on interrogation and confessions they had taken.¹ We affirm in part and reverse in part. The following facts are derived from the record developed before the Law Division.

On April 17, 2009, the then SCPO Administrator and Custodian of Records certified that he "personally searched the appropriate SCPO files and confirmed that no documents existed within the possession or control of the SCPO that were responsive to this request." A similar certification was also submitted by the Director of the County of Somerset Division of Human Resources.

On May 15, 2009, a subsequent SCPO Administrator and Custodian of Records submitted a certification in opposition to plaintiff's OPRA complaint in which he indicated that after reviewing "the employment background check" of the two detectives in question, he found a "two-page document reflecting training courses attended by Kristen (Best) Houck prior to the time she became employed with the SCPO." No similar discovery

¹ Both of these detectives are employed by the SCPO. They were involved in a criminal investigation that led to plaintiff being indicted for second degree sexual assault, N.J.S.A. 2C:14-2b, and third degree endangering the welfare of a child, N.J.S.A. 2C:24-4a. Plaintiff initially sought access to these records during discovery in his criminal case pursuant to Rule 3:13-3(b). He filed this OPRA complaint after the criminal court denied his discovery motion. The propriety of the criminal court's decision is not before us in this appeal.

was made with respect to Detective Ramos. The two-page document was attached to the SCPO custodian's certification and was presented to the trial judge adjudicating plaintiff's OPRA complaint for her in camera review.

The matter came before the trial court on the return date of plaintiff's order to show cause. The SCPO argued that, with respect to Detective Ramos, the Custodian of Records had complied with his obligations under OPRA by certifying that there were no records for Ramos that responded to plaintiff's request. With respect to Detective Houck, the SCPO argued that the custodian's certification made clear that there was no curriculum vitae on record for her. As to the two-page course list, the SCPO argued, inter alia, that this document was protected from public disclosure as a personnel record under N.J.S.A. 47:1A-10.

After hearing from counsel, the trial judge asked the SCPO Administrator, who was apparently seated somewhere in the courtroom, to describe the "basic qualifications for someone to become a prosecutor's office investigator." According to the Administrator, an investigator must "attend" the Division of

Criminal Justice Academy and "get" a police training commission certification.²

Based, at least in part, on this information, the trial judge denied plaintiff's request to obtain copies of the two-page document that listed the training and schools Detective Houck attended prior to her employment at the SCPO. Relying on N.J.S.A. 47:1A-10, the judge concluded that this document was exempt from public disclosure because OPRA "only requires that the educational qualifications required for governmental employment be satisfied (sic) as a public record." Thus, assuming that the detective "completed . . . the Division of Criminal Justice's course . . . [a]nything over and above that . . . is at the pleasure of the prosecutor."

From this record we now affirm the trial court's ruling with respect to plaintiff's request for records pertaining to Detective Ramos. The certification of the SCPO Custodian of Records indicates that no records exist that are responsive to plaintiff's request concerning Detective Ramos. Absent evidence to the contrary, we agree with the trial court's decision to accept the custodian's certification as competent and conclusive

² Although there may be some distinction within the law enforcement community between "detective" and "investigator," according to the SCPO Administrator, in Somerset County these titles are considered practically synonymous.

evidence on this point. The SCPO is not obligated under OPRA to create a document that compiles information; it is only obligated to provide that which is already in existence. Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30, 37-39 (App. Div. 2005).

We reverse, however, the court's ruling that exempted from the definition of "government record" the two-page document pertaining to Detective Houck. We review the trial court's ruling in this respect de novo because the resolution of this issue involves purely a question of law. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Our discussion to determine whether this document falls within the purview of OPRA's public disclosure provisions will be guided by the overarching public policy expressed by the Legislature in N.J.S.A. 47:1A-1: "any limitations on the right of access accorded by [OPRA] shall be construed in favor of the public's right of access[.]" The statute thus broadly defines "government record[s]" to include documents "made, maintained or kept on file in the course of . . . official [government] business," but exempts twenty-two categories of information from the definition. N.J.S.A. 47:1A-1.1 (emphasis added).

Based on the certification submitted by the SCPO Custodian of Records, there is no question that the two-page document

listing the courses attended and training received by Detective Houck was "kept" or "maintained" by the SCPO "in the course of . . . its official business." N.J.S.A. 47:1A-1.1. Thus, absent a countervailing legal impediment, the document is within the definition of "government record" under OPRA. Ibid.

The trial court found an impediment, however, in N.J.S.A. 47:1A-10, which exempts from the definition of "government record"

the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, . . . and [such records] shall not be made available for public access, except that . . .

. . . .

data contained in information which disclose conformity with specific experiential [or] educational . . . qualifications required for government employment . . . shall be a government record.

[N.J.S.A. 47:1A-10 (emphasis added).]

Relying on the underscored language, the trial court found that the list of courses taken and training received by Detective Houck before her employment at the SCPO was "above" the qualifications required for employment and thus "at the pleasure of the prosecutor." We are unable to discern any factual or legal basis for the court's conclusion.

As a starting point, we note that the custodian of the government record has the burden of proving that the denial of access is authorized by law. N.J.S.A. 47:1A-6. The only competent evidence presented by the SCPO here was the certification submitted by the Custodian of Records. The impromptu colloquy between the judge and the SCPO custodian is wholly devoid of evidential value because the information elicited from this person was not under oath, N.J.R.E. 603, nor subject to cross-examination, N.J.R.E. 611. Although N.J.S.A. 47:1A-6 obligates the court to adjudicate complaints filed under OPRA in "a summary or expedited manner," the proceedings of the court must nevertheless be in accordance with the rules governing summary actions. Courier News v. Hunterdon County Prosecutor's Office, 358 N.J. Super. 373, 378-79 (App. Div. 2003).


There is nothing in the language of N.J.S.A. 47:1A-10 to support the court's ruling to exempt the two-page document from the definition of "government record." Indeed, the statute clearly states that education and qualification records required for employment are to be considered as falling within the purview of "government record." N.J.S.A. 47:1A-10. Given the overarching public policy favoring public disclosure, any

ambiguity must be resolved against those seeking to withhold information from public scrutiny. N.J.S.A. 47:1A-1.

Finally, based on our own review of the document at issue,³ we are satisfied that it does not contain any private or confidential information that would trigger any concern for Detective Houck's privacy rights. Burnett v. County of Bergen, 198 N.J. 408, 430-32 (2009). The document does not contain any personal financial information, her social security number, her health records, or any disciplinary personnel matters.

Affirmed in part and reversed in part.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION

³ As part of the appellate record, the SCPO provided us, under seal, with a copy of the two-page document reflecting the courses attended and the training received by Detective Houck.